United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

627

NO. 18,555

ALEXANDER K. RANSOM, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court
for the District of Columbia

Arthur B. Hanson
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STATEMENT OF QUESTIONS PRESENTED

1. Whether the court below erred in allowing the second charge in the indictment [grand larceny] to be presented to the jury, and if not whether the evidence in the case can support the jury's conviction of grand larceny.

2. Whether the court erred in its instructions to the jury relative to petit larceny and the determination of the value of the property involved.

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BRIEF FOR APPELLANT

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TABLE OF CASES

This is an appeal from a conviction by the United States District Court for the District of Columbia on charges of housebreaking, D. C. Code §22-1801, and grand larceny, D. C. Code §22-2201; that court has jurisdiction over such criminal cases under D. C. Code §11-306.

This Court's jurisdiction is invoked under Act of June 25, 1948, C 646, 62 Stat. 929, U.S.C.A. Title 28 §1291.

STATEMENT OF THE CASE

At approximately 3:30 a.m. on the morning of October 30, 1963, the Belmont Television store was broken into, and three television sets were taken, all used and all in inoperative condition, having been brought in by customers for repair. The police were summoned by a Mr. A. C. Henry Isaac who claims to have seen three men break into the store by breaking the glass panel in the front door, and then emerge from the store each carrying a television set, and run. The police arrived, Mr. Isaac got in the police cruiser, and they commenced searching for the three men.

Approximately fifteen minutes after the breaking and entry, the police cruiser went up an alley three blocks from the store, where three television sets were spotted, sitting alone. Appellant was found nearby, under an automobile. Mr. Isaac identified appellant as one of the three men who he had seen leaving the scene of the theft. Appellant was charged with housebreaking and grand larceny. The indictment charges larceny of three television sets of an aggregate value of $450.

At the trial, it came to light that the witness, Mr.

Isaac, has a criminal record (T.R. 20), and in fact had previously been arrested by the arresting officer in this case (T.R. 34). The manager of Belmont Television testified that the value of the sets to the store he managed was $30.00 apiece (T.R. 47), while their value if he were to sell them to retail consumers would be $35.00 to $40.00 apiece (T.R. 46).

Upon establishing the value to the store as $30.00, counsel for defendant below moved that appellant be acquitted of the charge of grand larceny (T.R. 47) as the aggregate worth of the sets could not exceed $100. The court denied this motion (T.R. 48).

The jury found appellant guilty of both charges of the indictment, housebreaking and grand larceny. From this conviction, appellant appeals.

STATUTES INVOLVED

D. C. Code §22-2201 Grand Larceny

"Whoever shall feloniously take and carry away anything of value of the amount or value of $100 or upward, including things savoring of the realty, shall suffer imprisonment for not less than one year nor more than ten years."

D. C. Code §22-2202 Petit Larceny

"Whoever shall feloniously take and carry away any property of value of less than $100, including things savoring of the realty, shall be fined not more than $200 or be imprisoned for not more than one year, or both. And in all convictions for larceny, either grand or petit, the trial justice may, in his sound discretion, order restitution to be made of the value of the money or property shown to have been stolen by the defendant and made way with or otherwise disposed of and not recovered."

STATEMENT OF POINTS

1. The trial court erred in allowing the charge of grand larceny to be presented to the jury, and the evidence fails to support a conviction of grand larceny.

2. The charges to the jury relative to petit larceny and value were incomplete and misleading, and constitute error.

SUMMARY OF ARGUMENT

In the lower court the burden of proof was on appellee to prove beyond a reasonable doubt each element of each charge in the indictment. As to the grand larceny charge, one element it was necessary for appellee to prove was that the property allegedly stolen was of a value of $100 or upward.

To prove this point, appellee offered only the testimony of the manager of the store involved who indicated on direct examination that each of the three sets was worth $35 to $40, but admitted on cross examination that his store would pay only $30 for them.

As the only market for used television sets in inoperable condition is one wherein the purchaser is a television dealer or repairman, the $30 the manager of the store would offer for these sets establishes the market value. And the $35 to $40 figure was an uninformed guess as to their value in the non-existent market wherein a retail consumer would be the purchaser.

The manager of the store was never qualified as an expert, and, therefore, cannot give an opinion as to the value of the television sets to someone else.

Appellee did not carry its burden of proof as to grand larceny; the court should have granted appellants motion for acquittal as to that charge; and from the evidence, the jury could not convict appellant of grand larceny.

The court below erred in its instructions to the jury in that the charge as to petit larceny was incomplete as it did not instruct on lesser included offenses, and the jury could not tell if they might properly return a conviction of petit larceny only.

There was also error in the courts charge as to the value of the property involved in that the court indicated that the controlling value was the price to the retail consumer, which was the higher figure set by the store manager, giving the jury no choice but to choose this higher figure. As the only market for these broken appliances is a sale to a dealer or repairman, the court should have instructed the jury that if that is the market, the lower price is the market price, or if there is no market for broken television sets what they could have been sold for at the date of the larceny is controlling.

ARGUMENT

The Trial Court Erred In Allowing The Charge Of Grand Larceny To Be Presented To The Jury, And The Evidence Fails To Support A Conviction Of Grand Larceny.

With respect to point 1, appellant desires the Court to read the following pages of the reporter's transcript: T.R. 43-50 inclusive.

In the District of Columbia, grand larceny is the felonious taking and carrying away of "anything of value of the amount or value of $100 or upward," D. C. Code §22-2201. In a trial for any crime, the burden of proof is on the prosecution throughout the trial, and this burden applies to each and every element necessary to constitute the crime, Davis v. United States, 160 U.S. 469. Without the proof of each of the various elements of the crime, a conviction cannot stand, McKenzie v. United States, 75 U.S. App. D. C. 270, 126 F.2d 533; Williams v. United States, 94 A.2d 473. In the instant case, one of the elements of the crime of grand larceny which it was necessary for appellee to prove, was that the value of the property which was the subject of the larceny was in excess of $100. Appellant needs no authority for the proposition that the law casts no burden of proof on the defendant, and appellant, here, was under no obligation to show a value of less than $100.

The only evidence offered by appellee regarding the value of the three television sets involved, was the testimony of Mr. Thomas Lewis, the manager of the store from which three television sets were taken. Set forth below, is Mr. Lewis' entire testimony relating to the value of the three television sets, which constitutes the entire proof offered by appelee as to value.

Direct Examination:

Q. Directing your attention again to October 30, 1963, Mr. Lewis, on that date, what was the value, what was the worth of each one of these sets?

A. As the worth that day?

Q. That is correct.

A. I'd say thirty-five to forty.

Q. A piece?

A. A piece.

THE COURT: Is that dollars:

THE WITNESS: Yes, ma'am.

MR. SIDMAN: The Court indulge me a moment.

THE COURT: Yes

MR. SIDMAN: Nothing further, Your Honor.

Cross-Examination:

Q. And when you refer to the value of these, could

you be a little specific in ascertaining this value, because this value is extremely important. Now, is this the wholesale value you are stating?

A. None of the three sets taken out of the store were working. They happened to be customers' sets that were brought in. I'd say in the condition that they were in, not working, they were worth thirty-five to forty dollars as they were.

Q. This is what the wholesale value would be or retail value?

A. That is what I would sell them for if someone was to want to purchase them.

Q. What would your store pay for them if they brought these in, would you pay that much for them in your store?

A. No, I wouldn't pay that much for them, I am speaking of what I would sell them for.

Q. What would you estimate your store would pay for these if they were brought in, each one singly?

A. I would say maybe five dollars cheaper than that, I'd say maybe thirty.

MR. SILER: Thirty dollars. I have no further questions, your Honor."

The Court correctly instructed the jury that the con-

trolling value in these cases is the "market value." And the Court was again correct in defining "market value" as the price a willing purchaser would pay a willing seller, neither being compelled.

It should be noted from the testimony that the television sets involved were used customers' sets, not in working order, which had been brought into the store to be repaired. There is no indication the sets were ever examined to determine what was wrong with them, or what expense would be involved in their repair. Certainly had one set required a new picture tube and another only an ordinary vacuum tube, their values would have been different. Had all of the sets been new, it is conceded their "market" value would have been the retail price asked by the dealer. Even had the sets been used but in working order a market value could, perhaps, have been determined based on past sales of such sets to customers.

Appellant submits, however, that Mr. Lewis' estimate of $35 to $40 as the value of each set was pure speculation and a bad guess at best. There is certainly no market for used television sets as far as the retail consumer is concerned. Mr. Lewis clearly established the market value of these sets when he testified to the effect that he, a willing purchaser not compelled to purchase, would pay $30 a piece for these

sets should a willing seller, not compelled to sell, offer them to him. There is the concrete establishment of a market value based not on some hypothetical buyer, but rather on a real buyer who might well be in the market for such a set. Mr. Lewis knows what he would pay for these sets but what someone else would pay is purely conjecture on his part.

It is difficult to ascertain in what role Mr. Lewis was cast when giving testimony as to the value of the sets. He was not the owner of the sets. As a possible prospective purchaser he could testify as to what he would pay for them, but in testifying as to what someone else would pay for them it is assumed he was cast in the role of an expert, giving opinion testimony, as the sets have no readily ascertainable value such as a new set would have.

If Mr. Lewis was an expert witness, he was never properly qualified. There is no indication in the record that he had any experience in this line, or that his position as manager of the store required his having any knowledge of television sets or their value. While it was not necessary that he be an expert to testify that he, a willing buyer, would pay $30 a piece for the sets, appellant contends only an expert could give his opinion as to the value of such sets to other people. In Tyles v. United States 103 U.S. App. D.C. 22, 254 F.2d 725,

cert. den. 356 U.S. 961, cert. den. 362 U. S. 943, the Court said at 254 F.2d 731:

> "A fact can be testified to by any witness, but with a few exceptions, an opinion can be given in evidence only by an expert, and the qualifications as an expert, and the reasons for his opinion are part of the premise for allowing him to testify."

Mr. Lewis was never qualified as an expert in any field much less the field of broken television sets.

While it is true that once a witness has been qualified as an expert, it is generally left to the discretion of the trial court to determine from this qualification, if he possesses the requisite degree of expertise, here, no attempt was made to qualify the witness as an expert at all.

Assuming, arguendo, this Court should find Mr. Lewis to be an expert in valuing broken television sets, then the figure of $30 which he would be willing to pay for the sets takes on even more significance as the market value. Regardless of his status as an expert or not, the amount he, as a willing buyer, would pay for the sets establishes the market value far more effectively than his opinion as to what someone else would pay.

Appellant contends that the only market for broken television sets is one in which a dealer in, or a repairer,

of, such sets is the buyer. Broken television sets have no market value to the consuming public. There is a market wherein dealers and repairers are the buyers, only because such dealers and repairers have the ability to repair these sets at an ascertained cost and sell them as a different item (i.e. working used T.V. sets) for a profit. Needless to say, the market value of a broken television set which has not had the cause of its inoperative condition diagnosed is considerably less than one that has. Mr. Lewis ascertained that he would pay $30 for a set such as one of the three involved here, and if he is an expert, a dealer, a repairer of television sets, then he is one of those people in the market for broken sets; and, consequently his offer of $30 is one by which we must establish our standards of market value for these appliances. Clearly the Government failed to carry its burden of proof in establishing the aggregate value of the television sets as being in excess of $100. Clearly the aggregate market value of such sets was established as $90 Proof of a value of $100 or upward is a necessary incident to establishing the crime of grand larceny.

Accordingly, the Court below should not have allowed the charge of grand larceny to be presented to the jury; and the evidence cannot support the jury's conviction of grand larceny.

The Instructions To The Jury Relative To Petit Larceny And Value Were Incomplete And Misleading

With respect to point 2, appellant desires the Court to read the following pages of the reporter's transcript: T.R. 66-75 inclusive.

The value of the television sets is the point upon which this case turns, regarding the commission of a felony as opposed to a misdemeanor. Counsel for defendant below, in his opening argument, agreed that the value of the sets was one of two questions in the case. As the value of these sets is the crux of the case involving grand larceny, and as it appeared from the testimony that the question of value was confused, it would seem to naturally follow that the Court should be particularly careful and complete in its instructions in this area. The Court instructed as to petit larceny as follows:

> "Petit larceny consists of the felonious taking and carrying away of property of the value of less than $100. The words 'feloniously take and carry away' which are used in the law defining larceny mean that the property must have been unlawfully taken with intent to deprive the owner of it." (T.R. 70)

and,

> "Your verdict as to each count [housebreaking and grand larceny] may be either guilty or not guilty.

> You may find the defendant guilty as to each charge as to which you believe the government has established the charge by the evidence beyond a reasonable doubt. If you believe the defendant is innocent or if you believe that the government has failed to establish the charge beyond a reasonable doubt, then you would find him not guilty."
>
> "In the case of a finding of guilty as to Count Two, then you are to indicate whether you find the defendant guilty of grand larceny, that is, of taking property of the value of $100 or upward, or whether you find him guilty of petit larceny." (T.R. 73) (Bracketed material added)

The second count of the indictment charged grand larceny, yet the Court failed to state at any point in its instructions, in plain words, that petit larceny was a lesser included offense, and that if the jury concluded that the government had not established beyond a reasonable doubt that the value of the television sets was $100 or more, they must find appellant guilty of petit larceny only, as it is a lesser included offense. The failure to put in plain words a legal point upon which the case turns is error, McKenzie v. United States, supra, a juror might well have felt that he must return a verdict of guilty of grand larceny or else not guilty, since grand larceny was the charge; or that if he did return a verdict of guilty of petit larceny such a conviction could not stand in a trial for grand larceny. If an instruction gives the jury a wrong impression when applied to the evidence

in the case, it is reversible error, Biggs v. State, 167 N.E. 129.

It is interesting to note that McKenzie v. United States, supra, also recognizes as error, the failure to instruct that unless the jury found from the evidence, beyond reasonable doubt that all of the elements of the crime charged existed, the defendant must be acquited. That same error is manifest here as no such instruction was given.

As to the instruction regarding value (T.R. 74), appellant previously noted that market value was the correct criterion and that the lower court's definition of market value was acceptable. However, the remainder of the instruction prejudices appellant's contention that the market for broken television sets necessarily requires that the purchaser be a dealer. The Court said:

> "*** Just as when you go to the grocery store to buy groceries, you pay the market price. You go to a second hand store to buy something, you pay the purchase price."

Here the trial court was indicating that the only price the jury must consider is the price to the retail consumer, so that only the $35 or $40 figure would be considered by the jury. When in fact there is no such retail consumer market for this item.

In explaining the value, the court should have instructed the jury that if there is only this market wherein the dealer is the purchaser, then that is the market to be considered, and the price he is willing to pay is the market price. Or if it be concluded there is no market for these broken sets then the sum which could probably have been obtained for them on the date of the loss is controlling, and this sum would be the result of fair negotiations between an owner willing to sell and a purchaser willing to buy; Standard Oil Co. v. Southern Pacific Co., 268 U.S. 146.

Conclusion

The court below committed error in not granting appellant's motion to acquit appellant as to the charge of larceny; the evidence does not support the verdict as to the charge of larceny; and the Court below erroneously instructed the jury as to petit larceny, and the value of the subject property.

For these reasons appellant respectfully requests that the judgment of the United States District Court for the District of Columbia be reversed, and the case be remanded for a new trial.

Arthur B. Hanson

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,555

ALEXANDER K. RANSOM, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
BARRY SIDMAN,
DAVID EPSTEIN,
Assistant United States Attorneys.

QUESTIONS PRESENTED

In the opinion of appellee the following questions are presented on appeal:

(1) Whether the testimony of the store manager of the burglarized television shop stating that the value of the stolen sets totaled more than one hundred dollars is sufficient to support a conviction of grand larceny?

(2) Whether the court's instructions on the elements of grand larceny and on the lesser included offense of petit larceny, without objection, fully informed the jury on the alternative verdicts which were available?

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TABLE OF CASES

* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,555

ALEXANDER K. RANSOM, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed on December 23, 1964, appellant was charged with a two-count violation of the criminal law: housebreaking (22 D.C.C. 1801) and grand larceny (22 D.C.C. 2201). After a trial by jury appellant was convicted on both counts and sentenced, by judgment and commitment filed on March 23, 1964, to a term of imprisonment under the Federal Youth Corrections Act, 18 U.S.C. § 5010(b).

At trial three witnesses testified. A. C. Henry Isaac, an eyewitness, was walking near the Belmont Television

Store, 2414 - 14th Street, Northwest, at 3:30 a.m. on October 30, 1963. He saw three persons enter the store, after kicking in the glass door, and then observed them in the store. After seven or eight minutes they left; each person was carrying a television set. As a result of this occurrence he called the police and accompanied the officers when they arrived on the scene. At Thirteenth and T Streets, Northwest, the three culprits were seen running down an alley carrying the stolen sets. Subsequently, the police arrested one of the thieves, appellant, who was then identified by the witness Isaac. (Tr. 7-20.)

Officer Paul R. Caton, a detective assigned to the General Assignments Squad of the Metropolitan Police Department, arrived on the scene in a cruiser within minutes after receiving radio information about the housebreaking. After picking Mr. Isaac up, a systematic search was made in the alley where the three thieves were seen escaping. In the alley the officer found the three television sets and nearby, under an automobile, appellant was found hiding. (Tr. 20-24, 27-28.)

The third witness, Thomas Lewis, was the manager of the store and arrived at the scene after receiving a phone call from the police. He observed the broken glass door, saw that some television sets were missing, and subsequently identified the recovered sets as belonging to the store. He testified that the value of the sets, if he were to sell them to a customer, was between thirty-five to forty dollars for each, a total of more than one hundred dollars for all three. If he were buying the sets for the store he would offer about thirty dollars for each. (Tr. 36-44, 46-48.)

On proper instructions, which included instructions on the standard the jury was to apply in determining market value and that petit larceny was a lesser included offense if the value was less than one hundred dollars, the case was submitted to the jury. (Tr. 70-74.)

STATUTES INVOLVED

D. C. Code § 22-2201 Grand Larceny

> "Whoever shall feloniously take and carry away anything of value of the amount or value of $100 or upward, including things savoring of the realty, shall suffer imprisonment for not less than one year nor more than ten years.

D. C. Code § 22-2202 Petit Larceny

> "Whoever shall feloniously take and carry away any property of value of less than $100, including things savoring of the realty, shall be fined nor more than $200 or be imprisoned for not more than one year, or both. And in all convictions for larceny, either grand or petit, the trial justice may, in his sound discretion, order restitution to be made of the value of the money or property shown to have been stolen by the defendant and made way with or otherwise disposed of and not recovered."

SUMMARY OF ARGUMENT

The store manager of the burglarized television store testified that the value of the stolen TV sets—the price for which he would sell them if a customer desired to purchase them—totaled more than one hundred dollars. This is sufficient evidence to support the jury determination that a grand larceny was commited.

The court clearly instructed the jury that to find appellant guilty of grand larceny the market value of the stolen sets must total more than one hundred dollars. If the jury found the value of the sets less than that amount, appellant would be guilty only of petit larceny. These were proper instructions. Further, no request for additional instructions was made so that the issue is not properly preserved for appellate review.

ARGUMENT

The conviction of grand larceny is supported by the evidence and was properly submitted to the jury.

(See Tr. 43-47, 70-74)

a) *The evidence of value*

The testimony of Thomas Lewis, the manager of the Belmont Television Store where the housebreaking occurred, was directed towards establishing possession and value. He identified the recovered television sets and stated that their value or worth was thirty-five or forty dollars for each: a total value of one hundred five to one hundred twenty dollars, an amount sufficient to sustain a conviction of grand larceny. Acknowledging that the sets were not in good working order, Mr. Lewis added that this price was "what I would sell them for if someone was to want to purchase them." The replacement value, the price the store would pay to buy such sets, was thirty dollars for each or a total amount of ninety dollars. (Tr. 43-47.)

No objection was made to any of Mr. Lewis' testimony, and he, as store manager, was best qualified to establish the value of the television sets. Numerous cases have upheld convictions of grand larceny based on testimony in which value is established by persons similarly situated. *E.g. Owens* v. *United States*, 115 U.S. App. D.C. 233, 318 F.2d 205 (1963) (television store manager); *Stevens* v. *United States*, 297 F.2d 664 (10th Cir. 1961) (a section supervisor and a part-time instructor at a corporation training school); *Greer* v. *State*, 220 S.W. 2d (Tex. Ct. Crim. App. 1949) (appliance dealer); *People* v. *Evans*, 178 N.E. 2d 376 (Ill. Sup. Ct. 1961) (jewelry store owner); *People* v. *Mack*, 177 N.E. 2d 841 (Ill. Sup. Ct. 1961) (sales clerk).

b) *The instructions to the jury*

Appellant acknowledges that the proper instructions were given to the jury on the issue of determining value

(Br. 9, 10): "market value" is the standard for determining whether a grand or petit larceny was committed[1] (Tr. 74). See, *Fulks* v. *United States*, 283 F.2d 259 (9th Cir. 1960), *cert. denied*, 365 U.S. 812, *rehearing denied*, 365 U.S. 864; *Darty* v. *State*, 193 S.W. 2d 195 (Tex. Ct. Crim. App. 1946); *People* v. *Lizarraga*, 264 P.2d 953 (Calif. Dist. Ct. App. 1954). The court clearly and repeatedly informed the jury that if appellant were found guilty of larceny, he could be found guilty of either grand or petit larceny, depending on the jury's determination of the value of the stolen television sets which were in evidence (Tr. 70-73). These instructions were sufficient. Further, appellant's failure to request additional instructions at trial on lesser included offenses forecloses his even raising this issue on appellate review. Rule 30, Fed. R. Crim. P.; *e.g. Duke* v. *United States*, 107 U.S. App. D.C. 382, 278 F.2d 262 (1960); *Ruffin* v. *United States*, 106 U.S. App. D.C. 97, 269 F.2d 544 (1959), *cert. denied*, 361 U.S. 865; *Villaroman* v. *United States*, 87 U.S. App. D.C. 240, 184 F.2d 261 (1950).

Moreover, appellant was given a general sentence under the Federal Youth Corrections Act, 18 U.S.C. § 5010(b). No points are raised on appeal with reference to his conviction on the charge of housebreaking. Since the sentence imposed on all counts is no more than the maximum punishment authorized by statute for conviction under any count, the conviction must be upheld if the defendant was properly convicted under any single count. *Kosmos* v. *United States*, 111 U.S. App. D.C. 234, 296 F.2d 356 (1961). See *Barenblatt* v. *United States*, 360 U.S. 109 (1959).

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[1] Congress defined "value" in the federal criminal legislation in 18 U.S.C. § 641, which provides, "The word 'value' means face, par, or market value, or cost price, either wholesale or retail, whichever is greater."

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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